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SEALED

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District of Nevada
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FILED ENTERED	RECEIVED SERVED ON COUNSEL/PARTIES OF RECORD
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CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

2007 HARLEY-DAVIDSON
"ROAD KING" MOTORCYCLE, VIN
1HD1FR4167Y720245,

Defendant.

2:14-cv-00066-JAD-NJK

ORDER

**EX PARTE MOTION FOR AN ORDER TO SEAL AND TO STAY THE CIVIL ACTION AND
ORDER**

The United States of America, by and through Daniel G. Bogden, United States Attorney for the District of Nevada, and Michael A. Humphreys, Assistant United States Attorney, respectfully moves this Court for an Order to seal and to stay this above-captioned civil forfeiture in rem action. The grounds for sealing and staying this civil action are to protect the ongoing grand jury investigation, the grand jury information, the ongoing criminal investigation, the undercover law enforcement officer, and the cooperating informants, and to prevent civil discovery in this case at this

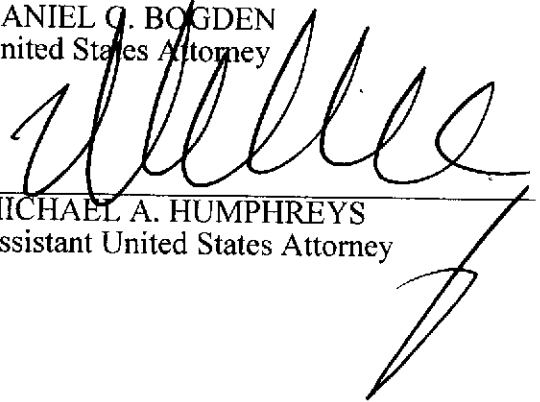
1 time which would adversely affect the ability of the United States to conduct the related grand jury
2 investigation and criminal investigation.

3 This Motion is made and is based on the attached Points and Authorities.

4 Dated this 14th day of January, 2014.

5 Respectfully submitted,

6 DANIEL C. BOGDEN
United States Attorney

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9 MICHAEL A. HUMPHREYS
Assistant United States Attorney
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a civil forfeiture action brought by the United States against the defendant for violations of Title II of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* The defendant is subject to civil forfeiture under 21 U.S.C. § 881(a)(4).

The facts for forfeiture under 21 U.S.C. § 881(a)(4) are set forth in the verified complaint. They show the defendants are involved in a violation of Title II of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*

Contemporaneously with this Ex Parte Motion, the United States is filing its Complaint for Forfeiture In Rem and is initiating the instant civil forfeiture action. The United States requests this Court to enter an Order for Summons and Warrant of Arrest In Rem for the Property and Notice and issue the Summonses and Warrants of Arrest In Rem for the Property to arrest the defendants to give this Court in rem jurisdiction of this case while the Ex Parte Motion, the Complaint, the Order, and the Summonses and Warrants remain sealed, and the case is stayed.

The United States will execute the Complaint, the Order, the Summonses and Warrants, and the Notice on the defendants to give the Court in rem jurisdiction of this case. However, no further action as required by the Order will be taken to avoid adversely affecting the ongoing grand jury investigation, the grand jury information, the ongoing criminal investigation, the undercover law enforcement officer, and the cooperating informants, until the ongoing criminal investigation and the grand jury investigation are completed.

The ongoing grand jury investigation, the grand jury information, the ongoing criminal investigation, the undercover law enforcement officer, and the cooperating informants should not be compromised by this civil case. Accordingly, this Ex Parte Motion, the Complaint, the Order, and the Summonses and Warrants should be sealed, and this civil action should be stayed.

...

...

1 II. ARGUMENT

2 A. This Court Should Seal This Civil Forfeiture Case.

3 The information in this Ex Parte Motion, the civil forfeiture complaint, the Order, and the
4 Summonses and Warrants must not be made available at this time to avoid adversely affecting the
5 ongoing grand jury investigation, the grand jury information, the ongoing criminal investigation, the
6 telephone wire tap information, the consensual monitoring information, the undercover law
7 enforcement officer, and the cooperating informants. This sealing will not prevent law enforcement
8 officer from executing the Summonses and Warrants on the defendants.

9 The law enforcement officer is undercover, has gone further and deeper into the illegal
10 gambling enterprises, and would be at great risk at this time if discovered. The complaint was drafted
11 carefully in an attempt to protect his undercover identity. Numerous confidential informants are also
12 involved in this case and need to be protected until Frank Evans, Allan Dobkowski, and Paul Yavorski
13 are indicted. Jason Baumgarten (2:09-CR-290-PMP-(PAL)) and Gregg Gariti (2:09-CR-381-JCM-
14 (VCF)) have pled guilty but still have not been sentenced because of the ongoing criminal
15 investigation and ongoing grand jury investigation.

16 The Ninth Circuit Court of Appeals stated, "The district court has the inherent power to seal
17 affidavits filed with the court in appropriate circumstances...The government contends that the
18 materials should be sealed to protect the informant and to keep confidential the ongoing investigations.
19 We find...the district court did not abuse its discretion." *United States v. Mann*, 829 F.2d 849, 853
20 (9th Cir. 1987) (citations omitted); *Offices of Lakeside Non-Ferrous Metals, Inc. v. United States*, 679
21 F.2d 778, 779 (9th Cir. 1982) ("The district court has inherent powers to seal affidavits filed with the
22 court in appropriate circumstances.") (citation omitted); *In Re Sealed Affidavit(s) to Search Warrants*
23 *Executed on February 14, 1979*, 600 F.2d 1256, 1257 (9th Cir. 1979) ("[T]he courts have inherent
24 power, as an incident of their constitutional function, to control papers filed with the courts within
25 certain constitutional and other limitations.") (citations omitted).

26 ...

1 The Ninth Circuit applies a balancing test in which the United States's necessity for secret
 2 proceedings or sealed documents are weighed against the public's interests that are affected by the
 3 court's action. *Times Mirror Company v. United States*, 873 F.2d 1210, 1213-1216 (9th Cir. 1989);
 4 *Offices of Lakeside Non-Ferrous Metals, Inc.*, 679 F.2d at 779 (The courts use a balancing test.).

5 Because of CAFRA and in spite of the ongoing grand jury investigation, the grand jury
 6 information, the ongoing criminal investigation, the undercover law enforcement officer, and the
 7 cooperating informants, the United States has one option at this time: to bring a civil forfeiture action,
 8 to seal the case, and to stay the civil action.

9 Therefore, because this Ex Parte Motion, the complaint, the Order, and the Summonses and
 10 Warrants contain information concerning the ongoing grand jury investigation, the grand jury
 11 information, the ongoing criminal investigation, the undercover law enforcement officer, and the
 12 cooperating informants, this Court should seal this case.

13 B. This Court Should Stay This Civil Forfeiture Proceeding Because Civil Discovery Will
 14 Adversely Affect The Ability Of The United States To Prosecute The Related Criminal Case And Will
 15 Disclose The Information Relating To The Confidential Witness.

16 Congress has specifically provided that upon motion of the United States, "the court shall stay
 17 the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the
 18 ability of the Government to conduct a related criminal investigation or the prosecution of a related
 19 criminal case." 18 U.S.C. § 981(g)(1) (emphasis added).

20 In this subsection, the terms "related criminal case" and "related criminal investigation"
 21 mean an actual prosecution or investigation in progress at the time at which the request
 22 for the stay, or any subsequent motion to lift the stay is made. In determining whether a
 23 criminal case or investigation is "related" to a civil forfeiture proceeding, the court shall
 24 consider the degree of similarity between the parties, witnesses, facts, and
 25 circumstances involved in the two proceedings, without requiring an identity with
 26 respect to any one or more factors.

24 18 U.S.C. § 981(g)(4). See *United States v. Jason Baumgarten*, 2:09-CR-290-PMP-(PAL); *United*
 25 *States v. Gregg Gariti*, 2:09-CR-381-JCM-(VCF); and the complaint for forfeiture in rem filed
 26 contemporaneously with this Ex Parte Motion.

1 The Supreme Court has expressly approved the district court's inherent power to approve stay
2 orders such as the one at issue here.

3 [T]he power to stay proceedings is incidental to the power inherent in every court to
4 control the disposition of the cases on its docket with economy of time and effort for
5 itself, for counsel, and for litigants. How this can best be done calls for the exercise of
6 judgment, which must weigh competing interests and maintain an even balance.

7 Impressed with the likelihood or danger of abuse, some courts have stated broadly that,
8 irrespective of particular conditions, there is no power by a stay to compel an unwilling
9 litigant to wait upon the outcome of a controversy to which he is a stranger. All the
10 cases advancing it could have been adequately disposed of on the ground that discretion
11 was abused by a stay of indefinite duration in the absence of a pressing need. If they
12 stand for more than this, we are unwilling to accept them. We must be on our guard
13 against depriving the processes of justice of their suppleness of adaptation to varying
14 conditions. Especially in cases of extraordinary public moment, the individual may be
15 required to submit to delay not immoderate in extent and not oppressive in its
16 consequences if the public welfare or convenience will thereby be promoted.

17 *Landis v. North American Co.*, 299 U.S. 248, 254-56, 57 S. Ct. 163, 166 (1936) (citations omitted).

18 See also *Rohan v. Woodford*, 334 F.3d 803, 817 (9th Cir. 2003) ("District courts have inherent
19 authority to stay proceedings before them...") (citation omitted); *Stern v. United States*, 563 F. Supp.
20 484, 489 (D. Nev. 1983) ("Every court has the inherent power to stay causes on its docket with a view
21 to avoiding duplicative litigation, inconsistent results, and waste of time and effort by itself, the
22 litigants and counsel.") (citations omitted).

23 The Supreme Court observed the widespread practice of "[f]ederal courts...deferr[ing] civil
24 proceedings pending the completion of parallel criminal prosecutions when the interests of justice
25 seem[] to require such action, sometimes at the request of the prosecution [and s]ometimes at the
26 request of the defense." *United States v. Kordel*, 397 U.S. 1, 12, 90 S. Ct. 763, 770, n. 27 (1970).

27 The Supreme Court has also stated that pending "criminal proceedings," such as the ongoing
28 criminal investigation and ongoing grand jury investigation, may justify delaying the forfeiture action.

29 Pending criminal proceedings present similar justifications for delay in instituting civil
30 forfeiture proceedings. A prior judgment to contemporaneous civil proceeding could
31 substantially hamper the criminal proceedings, which – as here – may often include
32 forfeiture as part of the sentence. A prior civil suit might serve to estop later criminal

proceedings and may provide improper opportunities for the claimant to discover the details of a contemplated or pending criminal prosecution.

United States v. \$8,850, 461 U.S. 555, 567, 103 S. Ct. 2005, 2013 (1983) (citations omitted).

Similarly, other courts have deferred to the public interest in law enforcement by giving priority to pending criminal prosecutions over a civil litigant's interest in the prompt adjudication of his or her civil claim.

In *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955, 83 S. Ct. 502 (1963), the Fifth Circuit noted the conflicting policies and objectives underlying the rules of discovery in federal civil and criminal cases:

In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. . . . A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit.

Campbell, 307 F.2d at 487 (citations omitted); *Bittaker v. Woodford*, 331 F.3d 715, 734-35 (9th Cir. 2003) (O'Scannlain, J., and Rawlinson, J., concurring); *Osband v. Woodford*, 290 F.3d 1036, 1042-43 (9th Cir. 2002). The Court continued:

The very fact that there is a clear distinction between civil and criminal actions requires a Government policy determination of priority: which case should be tried first. Administrative policy gives priority to the public interests in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonable prompt determination of his civil claims or liabilities.

Id. at 487 (emphasis added).

As Judge Bell noted in his concurring opinion, "The criminal aspect of the matters could not be ignored [because] the end result [of allowing discovery] was tantamount to allowing discovery under Federal Rules of Civil Procedure in a criminal proceeding, something we are powerless, as was the trial court, to authorize." *Campbell*, 307 F.2d at 492-493.

1 Courts also have approved the stay of civil proceedings simply because a civil litigant has the
2 potential to exploit civil discovery to the detriment of a related criminal investigation. In *United States*
3 *v. Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir. 1976), the civil litigant had asserted his Fifth Amendment
4 privilege against self-incrimination during the discovery process as he simultaneously sought
5 Government production of documents which pertained to the ongoing criminal case against him. The
6 Third Circuit upheld the stay of the civil jeopardy assessment action upon a finding that the mere
7 similarity of issues between the civil and criminal cases opened the door for the taxpayer to abuse civil
8 discovery in order to gain an advantage in his criminal case.

9 It was clearly within the power of the district court to balance competing interests and
10 decide that judicial economy would best be served by a stay of civil proceedings. The
11 court found, and Meissner [the taxpayer] does not contend otherwise, that the civil
12 matter before it and the criminal case in New York involved substantial matters of the
13 same nature. Hence, it might well have been that resolution of the criminal case would
14 moot, clarify, or otherwise affect various contentions in the civil case. Furthermore, the
15 similarity of the issues left open the possibility that Meissner might improperly exploit
16 civil discovery for the advancement of his criminal case.

17 *Mellon Bank, N.A.*, 545 F.2d at 872-873 (citations and quotes omitted).

18 In *Larouche Campaign v. F.B.I.*, 106 F.R.D. 500, 501 (1985), the court stated that the broad
19 rules of civil discovery cannot be used to circumvent the more restrictive rules of criminal discovery.
20 To protect against circumvention of discovery rules in criminal proceedings and to protect against
21 impediments to an ongoing criminal investigation, the court in *Larouche* granted a stay of civil
22 discovery. The stay order was limited in time until the Grand Jury failed to return an indictment or
23 until the conclusion of the presentation of evidence at trial in the parallel criminal proceeding. *Id.* at
24 502. See also *White v. Mapco Gas Products, Inc.*, 116 F.R.D. 498, 503 (1987).

25 In its enactment of the Victim and Witness Protection Act of 1982, Congress recognized the
26 importance of protecting victims and witnesses in federal criminal cases. This legislative protection
was intended to prevent the intimidation and harassment of witnesses, including confidential
witnesses, during the criminal case process. However, the legislative committee acknowledged that
the Victim and Witness Protection Act could not be drafted with sufficient breadth to encompass all

1 witness intimidation and harassment situations. In *United States v. Tison*, 780 F.2d 1569 (11th Cir.
2 1986), during a pending federal criminal action, the counsel for the defendants attempted to bring a
3 state civil action to avoid the restrictions on federal criminal discovery and thereby obtain documents
4 and have access to witnesses that a defendant would not ordinarily be entitled to for use in the criminal
5 case.

6 The court in *Tison* affirmed the district court order enjoining the criminal defendants from
7 bringing a state civil action. In reaching its decision in the *Tison* case, the court disapproved of the
8 usage of "the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions
9 on criminal discovery . . ." *Id.* at 1572. The *Tison* decision also indicated that the obstruction of
10 justice statute may not be a sufficient safeguard to protect witnesses in the situation where the civil
11 discovery and criminal discovery rules come into conflict. *Id.* at 1572.

12 The enactment of 18 U.S.C. § 981(g) reflects Congressional recognition of the competing
13 interests at stake when there is a pending civil forfeiture action which is related to an ongoing criminal
14 investigation and grand jury investigation. The ongoing grand jury investigation, the grand jury
15 information, the ongoing criminal investigation, the undercover law enforcement officer, and the
16 cooperating informants should not be compromised by this civil case. The statute resolves those
17 competing interests by showing deference to the superior interest in having an unfettered completion
18 of the criminal matter even though the civil case must consequently suffer a delay.

19 The United States seeks to seal and to stay this civil forfeiture proceeding to allow the
20 completion of the ongoing criminal investigation and grand jury investigation related to this civil case
21 and for the protection of the ongoing grand jury investigation, the grand jury information, the ongoing
22 criminal investigation, the undercover law enforcement officer, and the cooperating informants should
23 not be compromised by this civil case. The ongoing criminal investigation and grand jury
24 investigation will be placed at risk through the premature disclosure of the civil forfeiture action, the
25 witnesses, and the documents which would be routinely discovered in a civil action. More importantly
26 ...

1 the protection of the undercover law enforcement officer and the confidential informants are
2 imperative.

3 In both cases, the parties are the same; the witnesses are the same; the facts are the same; and
4 the circumstances are the same. To continue with the forfeiture action at this time would frustrate and
5 inhibit the orderly completion of the criminal investigation and grand jury investigation by allowing
6 civil discovery, which could prematurely disclose sensitive details of the criminal case. The disclosure
7 of the details of these investigations would be substantially prejudicial to the United States.

8 Lastly, the ongoing grand jury investigation, the grand jury information, the ongoing criminal
9 investigation, the undercover law enforcement officer, and the cooperating informants should not be
10 compromised by this civil case.

11 **III. CONCLUSION**

12 This Court should grant the United States's motion to seal and to stay this civil forfeiture
13 action to avoid adversely affecting the ongoing criminal investigation and the ongoing grand jury
14 investigation and to protect the grand jury information, and the confidential witnesses.

15 Dated this 14th day of January, 2014.

16 Respectfully submitted,

17 DANIEL G. BOGDEN
United States Attorney

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19 MICHAEL A. HUMPHREYS
20 Assistant United States Attorney

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22 IT IS SO ORDERED:

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25 UNITED STATES DISTRICT JUDGE

26 DATED: January 16, 2014